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Index Reference :

General

CIRCULAR 02-384 (PA)

18 November 2002

LAW SOCIETY GUIDANCE NOTE

The Storage and Destruction of Old Files Revised on 18 November 2002

1. Ownership of Papers

The first task which should take place upon the conclusion of the retainer is a thorough review of the file to determine the ownership of the papers. Members should review the following extracts on "*Ownership, Storage and Destruction of documents*" from *Cordery on Solicitors*:-

"Is the client entitled to the whole file once the retainer is terminated?"

Not necessarily. Most files will contain some documents which belong to you, some which belong to the client and possibly others belonging to a third party. Documents in existence before the retainer, held by you as agent for and on behalf of the client or a third party, must be dealt with in accordance with the instructions of the client or third party (subject to your lien). Documents coming into existence during the retainer fall into four broad categories.

(a) Documents prepared by you for the benefit of the client and which have been paid for by the client, either directly or indirectly, belong to the client.

Examples: instructions and briefs; most attendance notes; drafts; copies made for the client's benefit of letters received by you; copies of letters written by you to third parties if contained in the client's case file and used for the purpose of the client's business. There would appear to be a distinction between copies of letters written to the client (which may be retained by you) and copies of letters written to third parties.

(b) Documents prepared by you for your own benefit or protection, the preparation of which is not regarded as an item chargeable against the client, belong to you.

Examples: copies of letters written to the client; copies made for your own benefit of letters received by you; copies of letters written by you to third parties if contained only in a filing system of all letters written in your office; tape recordings of conversations; inter-office memoranda; entries in diaries; time sheets; computerised records; office journals; books of account.

(c) Documents sent to you by the client during the retainer, the property in which was intended at the date of despatch to pass from the client to you, belong to you.

Examples: letters, authorities and instructions written or given to you by the client.

(d) Documents prepared by a third party during the course of the retainer and sent to you (other than at your expense) belong to the client.

Examples: receipts and vouchers for disbursements made by you on behalf of the client; medical and witness reports; counsel's advice and opinion; letters received by you from third parties."

2. Retention of Old Files

The following are *guidelines* on the *minimum* retention period of old files :-

Conveyancing	*15 years
Tenancy	**7 years from expiration of the tenancy agreement
General files	**7 years
Criminal cases	3 years from the expiration of any appeal period

*Title Deeds

Members should clarify the scope of the retainer in relation to the retention of title deeds. If the retainer does not extend to the safe custody of these documents, members should write to the client and seek instructions on returning these documents. If the client fails to provide instructions, members should write to the client to advise that a "storage charge" fee will be charged for the safe custody of these documents. The level of any fee will be a matter for the practitioner to decide and is obviously a contractual matter with the client. Members should note however that it is **not good conveyancing practice** to hold original documents with the file. Please see paragraphs 3 and 9 below.

(Added 1 June 2001)

**See Sections 51C and 51D of the Inland Revenue Ordinance Cap 112

(Added November 2002)

3. Destruction of Old Files

The responsibility for the decision to destroy a file remains with individual practitioners. The Society recommends that *once the retainer is terminated* all documents, which belong to the client, should be returned to the client. The failure to do so may cause future difficulties as original documents, such as deeds, guarantees or certificates, which are not your property, should not be destroyed without the *express written permission of the owner*.

4. Destruction of Original Documents

A. Generally

Original documents, such as deeds, guarantees or certificates, which are not your own property, should not be destroyed without the express written permission of the owner. Where the work has been completed and the bill paid, other documents, including your file, may be scanned and then destroyed. In cases of doubt the owner's written permission

should always be sought. If it is not possible to obtain such permission you will have to form a view and evaluate the risk.

B. Electronic Transactions Ordinance (Cap.553) ("ETO")

The ETO has specifically identified 13 types of documents in *Schedule 1 which must be kept as originals* :-

- "1. The creation, execution, variation, revocation, revival or rectification of a will, codicil or any other testamentary document.
 2. The creation, execution, variation or revocation of a trust (other than resulting, implied or constructive trusts).
 3. The creation, execution, variation or revocation of a power of attorney.
 4. The making, execution or making and execution of any instrument which is required to be stamped or endorsed under the Stamp Duty Ordinance (Cap 117) other than a contract note to which an agreement under section 5A of that Ordinance relates.
 5. Government conditions of grant and Government leases.
 6. Any deed, conveyance or other document or instrument in writing, judgments, and lis pendens referred to in the Land Registration Ordinance (Cap 128) by which any parcels of ground tenements or premises in Hong Kong may be affected.
 7. Any assignment, mortgage or legal charge within the meaning of the Conveyancing and Property Ordinance (Cap 219) or any other contract relating to or effecting the disposition of immovable property or an interest in immovable property.
 8. A document effecting a floating charge referred to in section 2A of the Land Registration Ordinance (Cap 128).
 9. Oaths and affidavits.
 10. Statutory declarations.
 11. Judgments (in addition to those referred to in section 6) or orders of court.
 12. A warrant issued by a court or a magistrate.
 13. Negotiable instruments. "
- (Added February 2002)

5. Electronic Storage of Files: The Evidence Ordinance ("the Ordinance")

The Ordinance was amended by the Evidence (Amendment) Ordinance 1998 on 13 January 1999. Members should review the provisions of Sections 46, 53 and 54 which deal with the admissibility of documents in civil proceedings whether or not that document is still in existence. (*apart from those documents listed in paragraph 4A above*).

Admissibility of Electronic Documents in :

a) Civil Proceedings

The broad and general definitions of "copy" and "document" in the Evidence Ordinance will allow for the admission of business records stored electronically.

(Amended November 2002)

b) Criminal Proceedings

Documents produced by computer are admissible under Sections 22A and 22B of the Ordinance.

c) Storage

Members can elect to store all their old files electronically.
(Amended November 2002)

d) Back-up Copies

Members should consider maintaining a duplicate set of disks with client information in a suitably secure and off-site location.
(Added January 2002)

6. Confidentiality

Members' should review Principle 8 on the Duty of Confidentiality in *The Hong Kong Solicitors' Guide to Professional Conduct* and ensure the destruction of the file does not jeopardise the confidentiality of its contents.

7. Commercial Providers of Record Management/Scanning Services

a) Members who wish to engage commercial providers should ensure that the confidentiality of the file is maintained. The Society has implemented a regulatory framework for commercial providers of record management services and relevant notifications of their contact details will be provided from time to time in the weekly circulars.
(See Law Society circular 02-385 (COM))

b) Members should ensure the Commercial Provider provides an appropriate affidavit on the scanning services provided in compliance with the requirements of the Evidence Ordinance:

- Identification of the document(s) scanned
 - Date of scanning
 - Identity of employee responsible for the scanning
 - Type of machine used
 - Whether the "hard copies" have been destroyed
- (Added January 2002)

8. Destruction of Old Files

(a) Upon the expiration of the appropriate retention period for closed files, members should ensure the files will be destroyed in a secure manner by engaging a suitable commercial provider.

(b) The files in the godown should be reviewed to remove clients' documents as there is no implied authority for the solicitor to destroy them.

9. Retrieval Charges

Members should arrange for the return of all of the clients' documents upon termination of the retainer. If, however, the client wishes the firm to retain his personal documents, the firm should enter into a written agreement with the client that the firm will provide such service upon payment of appropriate storage and retrieval charges.

10. Circular 02-44 (PA) has been superseded.